COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
CASE NO. 2015-SC-000247-DE

A.H. — APPELLANT

VS.

ON APPEAL FROM COURT OF APPEALS
NO. 2014-CA-001240-ME
KENTON CIRCUIT COURT CASE NO. 14-AD-00080

W.R.L., ET AL. — APPELLEES

BRIEF OF APPELLEES

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CERTIFICATE REQUIRED BY KY CR 76.12(6)

I, Amy H. Anderson, do hereby certify that the foregoing Brief of Appellees was sent via United States Postal Service, on this 10th day of October, 2015, to Margo L. Grubbs, Esq. and Jennifer B. Landry, Esq., Grubbs Law, PLLC, 327 W. Pike St., Covington, KY 41011; Lisa T. Meeks, Esq., Newman & Meeks Co., LPA, 215 E. Ninth St., Suite 650, Cincinnati, OH 45202; Christopher R. Clark, Esq., Camilla B. Taylor, Esq., Kyle A. Palazzolo, Esq., Lambda Legal Defense and Education Fund, Inc., 105 West Adams, Suite 2600, Chicago, IL 60603; Gregory R. Nevins, Esq., Lambda Legal Defense and Education Fund, Inc., 730 Peachtree St., NE, Suite 1070, Atlanta, GA 30308; Sam Givens, Clerk, Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601; Hon. Chief Judge Acree, KY Court of Appeals, Tate Building, 125 Lisle Industrial Ave., Suite 140, Lexington, KY 40511-2058; Hon. Debra Hembree Lambert, KY Court of Appeals, Pulaski County Court of Justice, 50 Public Square, Suite 3808, Somerset, KY 42501; Hon. Irv Maze, KY Court of Appeals, 700 W. Jefferson St., Suite 1010, Louisville, KY 40202-4724; and to Hon. Lisa O. Bushelman, Kenton Circuit Family Court Judge, Kenton County Justice Center, 230 Madison Ave., Covington, KY 41011. I further certify that ten (10) copies of this Motion were filed pursuant to Ky. CR 76.40 via Federal Express Delivery Service.

Amy H. Anderson, Esq.

INTRODUCTION

This is a case involving a step-parent adoption action into which the biological mother's former same-sex lover was permitted to intervene. The Court of Appeals reversed the Kenton Circuit/Family Court, correctly determining that the mother's former lover had no standing, and this appeal ensued.[1]

STATEMENT CONCERNING ORAL ARGUMENT

Appellees agree that oral argument would be beneficial to the Court in this case, not for the reasons articulated in the Statement Concerning Oral Argument contained in Appellant's Brief, but because this is a case of first impression in the Commonwealth of Kentucky. Contrary to the statement by Appellants, however, this case does not involve "the public importance of preserving the relationships children have with their non-biological parents and the need to address fully those objections to intervention" in a step-parent adoption proceeding, as the Appellant is not a parent, biological or non-biological.

[1] The Appellees will address the arguments and the plethora of misstatements contained in the Introduction to the Appellant's Brief to this Court later in this Response Brief, as such statements are not appropriate for the Introduction section of a Brief under the Civil Rules.

COUNTER-STATEMENT OF POINTS AND AUTHORITIES

COUNTER-STATEMENT OF THE CASE

From the first sentence of Appellant's Introduction in her Brief to the last sentence of the Conclusion, the Appellant makes a plethora of misstatements and misrepresentations in an attempt to "muddy the water" about this case to this Court and to confuse the issues. Indeed, the Appellant is trying to make this case a poster child for gay and lesbian parental rights.[2] This characterization by the Appellant is woefully misplaced--this case is ***NOT*** about gay and lesbian parental rights. This case involves the sole issue of whether a non-parent has standing to intervene in a step-parent adoption proceeding under Kentucky law when the biological parent is still exercising his or her superior and exclusive right to custody and has not waived that superior right to custody by clear and convincing evidence.

This appeal arises solely from a Petition for Adoption that was filed in the Kenton Circuit/Family Court on April 15, 2014. It is that adoption proceeding into which the Appellant moved to intervene; in that adoption action her intervention was granted by the Kenton Circuit/Family Court; that adoption action which was dismissed by the Kenton Circuit/Family Court; that intervention and dismissal in the adoption action which were appealed to the Court of Appeals; and that intervention and dismissal of the adoption action which the Court of Appeals reversed. This Court granted discretionary review at the Appellant's request.

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[2] That it is Appellant's strategy to make this case about a gay and lesbian parental rights issue is highlighted by the fact that the Appellant now has seven (7) attorneys of record representing her before this Court, four (4) of whom, including the author of the Appellant's Brief to this Court, are employed by the Lambda Legal Defense and Education Fund, Inc., an organization which was founded as the "nation's first legal organization dedicated to achieving full equality for lesbian and gay people" and whose mission statement is to "achieve full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation."

That the Appellant filed a subsequent and competing Petition for Joint Custody during the pendency of the adoption action, which is docketed as a separate proceeding before the Kenton Circuit/Family Court, is irrelevant to this action and is ***NOT*** in the record before this Court. The two cases have not been consolidated, and any references to that Petition for Joint Custody in the Appellant's Brief should be stricken from the record, as that action is not in the record before this Court.

Parties and Summary of Procedural History

At the outset, prior to delving into the facts of this case, it is important for this Court to understand who the involved parties are and the nature of their relationship to one another, as well as the procedural history of this case.

This action originated as a step-parent adoption proceeding in the Kenton Circuit/Family Court filed by W.R.L. who was seeking to adopt the child born to his wife, M.L., prior to their marriage to one another. M.L., the wife of the Appellee W.R.L., conceived and gave birth to the child in question while she was involved in a same-sex relationship with the Appellant, A.H. A.H. intervened in the underlying step-parent adoption proceeding and moved the Kenton Circuit/Family Court to dismiss the adoption proceeding claiming she had a custodial right to the child of M.L. The Kenton Circuit/Family Court granted A.H.'s request to dismiss the step-parent adoption proceeding stating that the "custody" rights of A.H. needed to be resolved before the adoption was ripe for adjudication. The Court of Appeals in its well-reasoned decision giving the Appellant every benefit of the doubt found that the Appellant does not have standing to intervene in this step-parent adoption proceeding thereby disagreeing with the ruling of the Kenton Circuit/Family Court and reversing it.

Relationship of M.L. and A.H.

M.L. and A.H. were involved in a same-sex relationship for several years beginning in 2005 (VR[3] No. 1: 6/18/14; 11:05:14), during which time they resided together in Cincinnati, Hamilton County, Ohio (R p.10). (M.L. and A.H. are hereinafter referred to as "the parties," as this appeal involves their relationship with one another.) In 2006, during the course of her relationship with A.H., M.L. decided to have a child (VR No. 1: 6/18/14; 11:10:47). It is true that A.H. was present for the conception, but M.L. found the sperm donor, her eggs were used, she carried the child and is the biological parent of the child (VR No. 1: 6/18/14; 11:11:10). M.L. and A.H. may have had discussions with one another about M.L. having a child, but contrary to the assertions by A.H. in her Brief to this Court, it was ultimately M.L.'s decision to conceive and give birth to the child in question. The parties were together during the time of M.L.'s pregnancy (VR No. 1: 6/18/14; 11:05:42), and A.H. was also present for the birth of the child (VR No. 1: 6/18/14; 11:11:24). The child was given A.H.'s surname (VR No. 1: 6/18/14; 11:06:18, 11:11:28). (See also R p.58).

While M.L. and A.H. did live as a family unit for a period of time following the birth of the child, M.L. asserts that it was never her intention to relinquish exclusive custodial rights in favor of "shared" custody with A.H., and she vehemently denies that she ever desired "joint" custody (R p.45). M.L. denies that there was ever an agreement of any sort, oral or written, to share custody of her child with A.H. (VR No. 1: 6/18/14;

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[3] Pursuant to CR 76.12, the notation "VR" is being used; however, the references are being made to the CD/DVD recording that has been certified into the record in this case, rather than to a video record which does not exist.

11:13:09). Aside from a document signed by A.H. and the sperm donor prior to the conception of the child (R p.17), which the Court of Appeals acknowledged has no legal relevance and is further unenforceable as a matter of law, there are no written documents evidencing any desire of M.L. to share custody of the child in question (VR No. 1: 6/18/14; 11:13:16). Additionally, that document was not signed by M.L., and therefore cannot be used as evidence against her. Further, A.H. and the sperm donor who signed that document do not have the judicial or legal right or authority to grant or confer parentage upon anyone or to limit or restrict M.L.'s superior and exclusive right to custody of her child (VR No. 1: 6/18/14; 11:12:06).

It is undisputed that M.L. and A.H. never filed any formal legal documents to evidence an intent to establish joint custody of the child, that they did not seek legal counsel to begin the process of establishing joint custody, and that they did not reduce that assertion to writing in any way over the course of their relationship with one another (VR No. 1: 6/18/14; 11:14:24). Indeed, there is no documentation whatsoever signed by M.L. evidencing an intent to share custody of her child with A.H. and to relinquish her superior right to custody of her child to A.H. in any way.

Relationship of Parties After Cohabitation of M.L. and A.H. Ceased

Subsequent to the termination of her relationship with A.H., M.L. moved with her child from Ohio to Kentucky in February, 2011 (VR No. 1: 6/18/14; 11:24:11). On May 6, 2012, M.L. married her current husband, Appellee W.R.L., and the child has lived exclusively with them in Kentucky since that time (R p.2).

After the relationship between M.L. and A.H. ended in 2011, M.L. allowed her child to have "visits" with A.H., though the parties contest the nature and extent of A.H.'s

contact and visitation with the child (R p.58). However, A.H. herself characterizes her time with M.L.'s child after her relationship and cohabitation with M.L. ended as "scheduled visitation," not custody in her Verified Motion to Intervene (R p.13). Although there was an assertion that there was a regular "visitation" schedule in place for A.H. to see M.L.'s child for a period of time after M.L. moved to Kentucky (VR No. 1: 6/18/14; 11:26:38), it is undisputed that there were periods of time when A.H. did not see M.L.'s child at all (VR No. 1: 6/18/14; 11:31:04).

In February, 2014, M.L. ceased the child's visitations with A.H. (VR No. 1: 6/18/14; 11:32:55), the reasons for which the Family Court did not take testimony (VR No. 1: 6/18/14; 11:31:20). In late March, 2014, A.H.'s counsel corresponded with M.L. regarding A.H.'s desire to seek joint custody and shared parenting of M.L.'s child (R p.18). Being opposed to the request by A.H. for joint custody and shared parenting of the child, M.L. and her husband then retained their own counsel. After researching the issue, counsel for M.L. and her husband determined that M.L.'s husband met the statutory requirements for a step-parent adoption of M.L.'s child under K.R.S. 199.470 *et seq.* and recommended that a step-parent adoption petition should be filed in the Kenton Circuit/Family Court on behalf of M.L.'s husband, W.R.L. (VR No. 1: 6/18/14; 11:15:49). In April, 2014, the Petition for Adoption was filed by M.L.'s husband with the Kenton Circuit/Family Court (R p.1). Contrary to the assertion by the Appellant in the first sentence of her Brief, the Appellees did not "hurriedly" file a step-parent adoption petition. Rather, that Petition for Adoption was filed based upon the fact that W.R.L. clearly met the criteria for a step-parent adoption under K.R.S. 199.470.

A.H.'s Efforts to Thwart the Adoption Petition

A.H. subsequently moved to intervene into that step-parent adoption proceeding and to dismiss the Petition for Adoption (R p.10), while contemporaneously filing a Petition for Custody in the Hamilton County (Ohio) Juvenile Court (VR No. 1: 6/18/14; 11:09:36). Both courts conferred and determined that Kentucky had jurisdiction to decide the matter. The Hamilton County matter was, therefore, dismissed for lack of jurisdiction. After written briefs were submitted and oral arguments were made in the Kenton Circuit/Family Court case, the Family Court sustained A.H.'s motions and dismissed the Petition for Adoption (R p.58). The appeal to the Court of Appeals followed.

The Court of Appeals concluded the following based upon the record before it: (1) that A.H. lacked standing in the adoption case and, as such, her intervention into the step-parent adoption proceeding was an error as a matter of law; (2) that A.H. would not have standing to pursue custody of the child based upon the facts in the record before the Court of Appeals; (3) that A.H. is not a person whose consent to the adoption is required under the provisions of K.R.S. 199.470 *et seq.;* (4) that even a colorable claim to a right to seek custody in a separate proceeding will not confer the right to intervene in a separate adoption proceeding; and (5) that A.H. cannot satisfy the requirements of K.R.S. 403.800(13)(a) and is, therefore, not "a person acting as a parent" who would have standing to pursue custody. In conclusion, the Court of Appeals reversed the Kenton Circuit/Family Court's ruling permitting A.H.'s intervention and dismissing the step-parent adoption proceeding, and remanded the case with instruction to reinstate the adoption petition.

A.H. is NOT A Parent Of M.L.'s Child

In her Brief, the Appellant takes certain liberties in her recitation of "material facts" and further interjects argumentative assertions and conclusions into her version of the facts which the Appellees wish to address. For example, she states that A.H. is listed as the other parent on medical and childcare forms and school documents. This was not a mutual decision between A.H. and M.L. A.H. listed herself on those documents; M.L. did not participate in that process. A.H. may cover the child on her health insurance plan, but that was not through the parties' agreement. A.H. unilaterally decided to do that, despite the fact that M.L. had taken steps to have the child insured in Kentucky. M.L. did not allow A.H. to claim the child as a dependent on her tax forms as alleged by A.H. in her Brief. Again, A.H. unilaterally made that decision. In fact, as M.L. had already filed her taxes claiming the child as a dependent, A.H. was required to amend her tax returns and remove that dependency exemption from her returns since the child could not be claimed twice.

Most importantly to M.L., the statement that "L.H. understands A.H. to be her mother" is absolutely unsupported by the evidence before this Court. The child does call A.H. "Nommy" (pronounced "no-me") which is an amalgamation of the words "no" and "mommy." That is a term which was coined by A.H. unilaterally. It is no different than any other nickname by which a person may be recognized or may wish to be identified. There is no testimony or evidence whatsoever in the record before this Court to indicate that M.L.'s child considers and understands A.H. to be her "mother" aside from the unsupported hearsay assertions contained in A.H.'s pleadings. Indeed, the child is ***NOT*** A.H.'s daughter; she is M.L.'s daughter.

A.H. asserts that she and M.L. continued to co-parent M.L.'s child, and share time between both homes following the termination of their relationship in 2011. However, as noted by the Court of Appeals, A.H. admitted and acknowledged in her Verified Motion to Intervene that the time she received with M.L.'s child was "scheduled visitation," (R p.13) which the Court of Appeals found to be relevant. A.H. has not alleged any facts to indicate that she had continuous physical custody of the child for a period of at least six months (nor could she); however, in her Brief, she now characterizes that time as "sharing time" between both homes, which is simply not established in the record which is before this Court.

Most notably, at no time did M.L. ever relinquish her exclusive custodial rights to her child in favor of shared custody with A.H. This is an absolutely untrue statement which is not supported by the record before the Kenton Circuit/Family Court or the Court of Appeals' decision. To make such a bold, blatantly untrue statement is ridiculous. As recognized by the Court of Appeals in its decision, the facts in the record in this case are clearly to the contrary.

Contrary to the assertions of A.H., the child is ***NOT*** A.H.'s child; she is M.L.'s child. Again, contrary to what A.H. wants this Court to believe, A.H. is ***NOT*** the child's mother; M.L. is the child's mother. No matter how many times A.H. may try to change those two facts, or how much smoke and mirrors she tries to use on this Court, she simply cannot create that scenario. A.H. may have spent a substantial amount of time with the child while she and M.L. were living with one another, and she may have had visits with the child after she and M.L. ceased living with one another. She and the child may have had a bond and may have had a relationship with one another. And, A.H. may have been

actively involved in the rearing of M.L.'s child while she and M.L. were together as a couple. But that does not make A.H. the child's parent. At best, she is in the capacity of a babysitter, nanny, au pair or some other non-parent relative who may spend time with a child. However, in no way does that demonstrate that M.L. has relinquished her superior right to custody of her child to A.H.

ARGUMENT

Despite A.H.'s attempt to convince this Court to the contrary and her valiant effort to make this case into a gay and lesbian parental rights case throughout her Brief, the questions of law which are before this Court are as follows:

1. Whether the adoption statutes set forth in K.R.S. 199.470 *et seq.* permit a non-parent such as A.H. to intervene and be a party to a step-parent adoption proceeding and require her to consent to the adoption when the biological parent or parents have not waived their superior right to custody of the child by clear and convincing evidence.

2. Whether A.H. has standing under any other Kentucky statute or precedent to intervene in this step-parent adoption proceeding.

The Appellees respectfully submit that both of these questions must be answered in the negative under the current state of Kentucky law as correctly decided by the Court of Appeals, and the Appellees urge this Court to affirm the Court of Appeals' decision.

I. IT IS NOT WITHIN THE PROVIDENCE OF THIS COURT TO REWRITE THE ADOPTION STATUTES SO AS TO ALLOW INTERVENTION BY THOSE NOT REQUIRED TO CONSENT BY THE STATUTES AS CURRENTLY WRITTEN AND IN EFFECT AND AS INTERPRETED BY RELEVANT CASE LAW.

It is uncontroverted that adoption is a statutory creation and that strict compliance with the adoption statutes set forth in K.R.S. 199.470 *et seq.* is required. As recognized by the Court of Appeals, this case is an adoption proceeding. While the Appellant would

like to turn this case into a custody case, it is not. It is an adoption case, plain and simple. Therefore, the adoption statutes set forth in K.R.S. 199.470 *et seq.* and the case law interpretations thereof are controlling in this case.

It has not been disputed that W.R.L. clearly met the criteria for a step-parent adoption as set forth in K.R.S. 199.470, *et seq.* A.H. argues, however, that she should have been named as a party to the step-parent adoption proceeding before the Kenton Circuit/Family Court, and if she was not named as a party to the proceeding, that she is still entitled to intervene into the step-parent adoption proceeding. That argument by A.H. is without merit and as correctly found by the Court of Appeals is not supported by existing Kentucky law for several reasons.

A. A Non-Parent Such As A.H. Is Not A Person Who Must Be Named As A Party Or a Person Whose Consent Is Required for Adoption Under The Express Language of K.R.S 199.470 *et seq.*

The adoption statutes set forth in K.R.S. 199.470 *et seq.*, specifically identify the parties to an adoption proceeding and those persons who must consent to an adoption. Indeed, a non-parent such as A.H. is ***not*** a person who must be named as a party or a person whose consent is required for an adoption under established and existing Kentucky law.

K.R.S. 199.480 delineates and mandates those persons and/or entities who must be named as a party in an adoption proceeding. Those persons include the *child* to be adopted; the *biological mother*; *the biological father if known and voluntarily named by the mother* and only if he meets one of several listed criteria; the child's *guardian*; and the *cabinet or other agency with which the child has been placed*, if that is applicable.

Further, K.R.S. 199.500 identifies and lists those persons whose consent is required for an adoption. Those persons are identified as follows: the *living parent or parents of a child born in lawful wedlock*, or *the mother of a child born out of wedlock*, and *the father of a child born out of wedlock if paternity is established.*

There is certainly no requirement in the adoption statutes that a person should be named as a party to an adoption or from whom consent to the adoption must be given due to a "colorable claim to seek custodial rights" or for any other reason. In fact, there is no requirement that anyone other than those individuals identified in the statutes be given notice of the pendency of an adoption proceeding or of the final hearing in an adoption proceeding.

A.H. clearly does not fall within the category of one of those persons whom the legislature has stated must be named as a party to an adoption proceeding or whose consent to an adoption is required. A.H. suggested in the Court of Appeals and infers in her Brief before this Court that the provisions of K.R.S. 199.490(1)(h) confer standing upon her to intervene in this adoption proceeding. K.R.S. 199.490(1)(h) provides that those persons "whose consent to the adoption is required" must be named as parties to an adoption proceeding or that "any facts necessary to locate such individuals whose consent may be required" must be included in the Petition for Adoption. As noted by the Court of Appeals, consent to adoption is required from only the limited number of persons specifically identified in K.R.S. 199.500, and A.H. is simply not one of those persons.

The Appellant clearly cannot be characterized as any one of the very specific classes of persons necessary to be named as an individual defendant in an adoption proceeding nor can she be classified as one of the specific individuals from whom

consent to the proposed step-parent adoption of M.L.'s child is required under the statutes. As such, her consent is ***not required*** for the adoption of M.L.'s child to be completed by her husband. There is simply no requirement in K.R.S. 199.470 *et seq*. that anyone else other than those classes of persons specifically identified in the statute be named as a party to an adoption proceeding or from whom consent must be obtained for an adoption proceeding. Indeed, A.H. is unequivocally not one of those individuals.

B. A.H.'s Alleged Claim To A "Custody" Interest In M.L.'s Child Is Not A Basis For This Court To Rewrite The Adoption Statutes Set Forth In K.R.S. 199.470 *et seq.*

A.H. again tries to confuse this issue by attempting to argue her Motion for Joint Custody, which is not before this Court. The **only** issue which was before the Court of Appeals, and which is before this Honorable Court, is whether A.H. had the right to intervene in the step-parent adoption proceeding filed by M.L.'s husband. The Court of Appeals correctly concluded that A.H. does not have standing to intervene into this adoption proceeding as a matter of law based upon the adoption statutes as currently written as discussed further above.

The Appellant is asking this Court, as she did in the Court of Appeals, to re-write the adoption statutes to include a non-parent in her position as a person who is required to be named as a party to a step-parent adoption proceeding and whose consent must be obtained in a step-parent adoption proceeding. As noted by the Court of Appeals in this case:

> "Adoption only exists as a right bestowed by statute… and there must be strict compliance with the adoption statutes. The law of adoption is in derogation of the common law. ***Nothing can be assumed, presumed, or inferred, and what is not found in the statute is a matter for the legislature to supply and not the courts."***

(Emphasis added.) See *Day v. Day, 937 S.W.2d 717, 719 (Ky., 1997).* The statutory requirements for adoption are, therefore, determinative.

As Appellant is not a compulsory party to be named in an adoption proceeding, and her consent is not requisite for the adoption to proceed pursuant to the adoption statutes, her intervention in this adoption proceeding is prohibited as a matter of law. There is no reason for her involvement in this step-parent adoption proceeding, as there is no role for her to play under the guidelines of the adoption statutes as currently written and in effect. To allow her participation would be the equivalent of adding additional requirements into the adoption statutory scheme, effectively rewriting the adoption statutes, which is a matter for the legislature rather than this Honorable Court.

II. A.H. DOES NOT HAVE STANDING TO INTERVENE IN THIS ADOPTION PROCEEDING.

The crux of the Appellees' argument in opposition to the Appellant's intervention in this case both before the Kenton Circuit/Family Court and before the Court of Appeals was that the Appellant lacked "standing" to intervene in this adoption proceeding. Contrary to the Appellant's arguments in her Brief to this Court, the Appellees have always maintained that the Appellant did not have standing to intervene in this proceeding. The argument that the Appellant does not have standing was clearly preserved by the Appellees at every stage of this litigation, from the trial court level forward, and the argument of the Appellant in her Brief attempting to convince this Court otherwise is misguided and simply untrue.

Similarly, the heart of the Court of Appeals' analysis in this case focused on whether there was any theory under Kentucky law as it exists at this time under which A.H. could establish "standing" in this adoption proceeding to permit her to intervene. The Court of Appeals correctly found that A.H. does not have standing for several reasons.

A. A Party Must Have Standing In Order To Intervene In Any Proceeding, And A.H. Did Not And Does Not Have Standing To Intervene In This Adoption Proceeding.

The concepts of "intervention" and "standing" are not synonymous. A significant portion of the Appellant's Brief to this Court is devoted to the arguments that the Appellant had the right to intervene in this step-parent adoption proceeding pursuant to the provisions of Civil Rule 24.01 and/or 24.02. Contrary to the assertions by the Appellant in her Brief, "standing" to intervene in an adoption proceeding is dependent upon one's "standing" to seek an adoption.

As this Court is aware, Civil Rule 24.01 deals with intervention in a proceeding "as a matter of right", and Civil Rule 24.02 deals with "permissive" intervention. In the interest of judicial economy, the Appellees will not go through an exhaustive analysis of these two concepts in this Brief. Indeed, the Appellees submit that the application of these two Rules as they regard intervention should never come into play in this case in view of the fact that the Appellant lacks the requisite "standing" to intervene in the first place, whether such intervention is as a matter of right or permissive.

The Court of Appeals correctly stated that if A.H. lacks standing in this case, then the Family Court's grant of intervention was error as a matter of law, whether such intervention was a matter of right under Civil Rule 24.01 or permissive under Rule 24.02.

The Court of Appeals stated as follows in this regard:

> We simply note that if A.H. lacked standing in this case, then the family court's grant of intervention as a matter of right under CR 24.01 constitutes error as a matter of law. On the other hand, as we discuss below, without regard to whether granting permissive intervention would be an abuse of discretion, it would be clear error to grant relief to a party who lacks standing, i.e., the "legally cognizable ability to bring a particular suit," with regard to "the subject matter of the suit" we are reviewing---adoption.

Contrary to the Appellant's assertions in her Brief to this Court, the Court of Appeals addressed both the issue of intervention as a matter of right under Civil Rule 24.01 and permissive intervention under Civil Rule 24.02, and with regard to both types of intervention, the Court of Appeals correctly found that without standing, intervention would be improper as a matter of law.

The Appellant's argument that Civil Rules 24.01 and/or 24.02 grant her some "right" to intervene in this proceeding is clearly misplaced. These two Civil Rules merely set forth the manner by which a party may intervene in a proceeding. These Rules do not identify the specific criteria which must be met by a party in order to have "standing" to intervene in a proceeding. Those criteria are based on the specific type of case that is involved and are determined on a case by case basis. The Appellant is the one who has conflated these two concepts, not the Court of Appeals or Appellees.

B. The Appellant's Reliance On The *Baker* Case And Its Progeny Is Misplaced.

The Appellant relies heavily on this Court's 2004 decision in *Baker v Webb, 127 S.W.3d 622 (Ky. 2004)*. Indeed, over six pages of the Appellant's Brief are devoted to her analysis of this Court's decision in *Baker*. It is submitted on behalf of the Appellees that this Court's decision in *Baker* is clearly distinguishable from this case and that it is not applicable to the facts before the Court in the instant step-parent adoption case.

The Court in *Baker* was confronted with the request by a child's second cousins to intervene in an adoption proceeding instituted by the child's non-relative foster parents. In that case, the child in question had been removed from the home of his biological father and had been placed in the care of the Cabinet for Families and Children, and shortly after the removal of the child from his father's home, the biological father committed suicide. Although the opinion is silent as to why or when this occurred, the biological mother's parental rights were terminated.

The child was placed in foster care by the Cabinet. The foster parents sought to adopt the child in question and filed an adoption action. Thereafter, the appellants, who were second cousins to the child, sought to intervene in the adoption proceeding, which was denied by the trial court. The appellants also filed a complaint with the Ombudsman of the Cabinet alleging that the Cabinet had erred in failing to consider them as potential adoptive parents for the child, and the Ombudsman agreed. The trial court denied the cousins' request to intervene in the adoption proceeding, and the Court of Appeals affirmed.

The Supreme Court in its opinion in *Baker* stated that it accepted discretionary review of the case in order to determine whether the [trial court] "erred in failing to allow the biological relatives of a minor child to intervene in an adoption proceeding instituted by a foster family" with whom the child was residing at the time of the filing of the adoption action. The Supreme Court concluded for reasons which are discussed below that based upon the facts in that case the trial court had erred and that the child's second cousins had a right to intervene under Civil Rule 24.01 as a matter of right.

The facts before the Court in the *Baker* case are clearly distinguishable from the facts before this Court in several ways, and the Appellant's reliance on the holding in the *Baker* case is flawed. In the *Baker* case, there were no biological parents involved; whereas here, in the case at bar, M.L. as the child's biological mother still has a superior right to the custody of her child unless she has relinquished that right by clear and convincing evidence under established Kentucky law, and she clearly has not done so as discussed in greater detail below in this Brief. This case is a step-parent adoption case with the biological mother's consent and does not involve the rights of two competing non-parents.

Equally as important in the *Baker* case was the fact that K.R.S. 620.090(2) and the regulations which govern the Cabinet with regard to foster care and adoption permanency services give priority to "relatives" of a child placed with the Cabinet for adoption. K.R.S. 620.090(2) specifically provides as follows:

> In placing a child under an order of temporary custody, the cabinet or its designee shall use the least restrictive appropriate placement available. Preference shall be given to available and qualified relatives of the child considering the wishes of the parent or other person exercising custodial control or supervision, if known.

The Court in *Baker* noted that the term "relative" is not defined by Kentucky statutory and case law.

The Court found that the policies and administrative regulations of the Cabinet giving priority to "relatives" of a child placed for adoption by the Cabinet and the failure of Kentucky statutory and case law to define the term "relative" vested the appellants as the child's second cousins with a "sufficient, cognizable legal interest in the adoption of the child" in question. In reaching this conclusion, the Court in *Baker* noted as follows:

> In so holding, we are ensuring that all options for a permanent placement are afforded children in need of a home. Evaluating several possible homes only more thoroughly serves the overriding legislative policy of considering the best interest of the child. By failing to initially evaluate Appellants (the second cousins) for placement, the Cabinet has done a disservice to everyone involved, particularly the child who may have been denied the opportunity to be raised in a home more suitable to his needs.

The Court in *Baker* concluded that the second cousins should have been permitted to intervene in the adoption proceeding as a matter of right under Civil Rule 24.01 based on the statutory language cited above and the regulations promulgated thereunder. Although the Court did not specifically discuss the issue of standing in *Baker*, its decision relied on the inescapable conclusion that the second cousins of the child had standing pursuant to the statutory language recited above.

As noted by the Court of Appeals in this case, the Court in *Baker* recognized that in order to intervene, a party's interest in the transaction must be a "present substantial interest in the subject matter of the lawsuit," rather than "an expectancy or contingent interest." *Id.* at 624. In this case, A.H.'s interest in M.L.'s child is not granted by statute as was the case in the facts before the Court in *Baker*, and M.L. has not relinquished her superior right to custody of her child. As such, the Court of Appeals correctly concluded that A.H.'s interest in M.L.'s child was merely an expectancy or a contingent interest.

Similarly, the Court of Appeals in *P.W. v. Cabinet for Health & Family Services, 417 S.W.3d 758 (Ky. App. 2013)* cited by the Appellant is distinguishable from the instant case. That case involved a claim by the child's cousins seeking to have the child placed in their home rather than the non-relative foster parents with whom the child had been placed a year previously when the child was removed from the custody of the biological mother and father for drug use. As such, that case did not involve a claim of a biological

parent versus a non-parent, but rather cousins versus non-parents acting *in loco parentis.* The Court in that case concluded that the child should remain with the non-relative foster parents stating that the "overriding legislative policy of the pertinent statutes and regulations is consideration of the best interest of the children." *Baker*, *Id.* Again, that case did not involve the claim of a biological parent versus a non-parent such as A.H.

The Appellant's reliance on this Court's decision in *Cabinet for Health & Family Services v. L.J.P., 316 S.W.3d 871 (Ky. 2010)* is likewise misplaced. In that case, grandparents' attempt to intervene in a voluntary termination of parental rights action of their biological grandson was denied. This Court noted that whether the grandparents had the right to intervene in the voluntary termination of parental rights proceeding must be determined based on the grandparents' statutory rights toward the child, or the parents, if any. The Court stated that "intervention" is not even mentioned in the termination of parental rights statutes (just as it is not mentioned in the adoption statutes which are applicable in this case) and, as such, the Court concluded that the grandparents did not have a statutory or unconditional right to intervene.

In fact, this Court in *L.J.P.* recognized, as did the Court of Appeals in the instant case, that any interest that the grandparents had in receiving custody of the child following the termination of the biological parents' parental rights would not be a "present substantial interest" but merely "an expectancy or contingent interest." The only reason the Court in *L.J.P.* noted in a footnote that the grandparents would be permitted to intervene in a future adoption proceeding was because they are the child's "relatives" who are to be given preference in the placement of a child whose parental rights have been terminated as discussed in the *Baker* case.

All of the above cases cited by the Appellant dealt with situations in which the biological parents' rights had either been terminated or were being terminated, and thus the biological parent no longer had a superior right to custody and the Courts' determinations of where and with whom the child should be placed.[4] Those cases cited by the Appellant in her Brief all dealt with non-parent relatives who were acting *in loco parentis*, and in each case, there was a statutory basis to permit the non-parent relative to intervene in the pending proceeding.

In the case at bar, M.L.'s child has a home—with M.L. and her husband. The issue of the child's placement with a non-parent is not before this Court. M.L. is the child's biological mother and has not waived her superior right to custody. M.L. did not enter into any agreement with A.H. to co-parent M.L.'s child. There is no statute giving A.H., a non-relative, any sort of preference for custody of M.L's child. The facts in the *Baker* case and the other cases relied upon by the Appellant in her Brief for this proposition are clearly distinguishable. The Court's decision in *Baker* simply should not and cannot be extended to grant a non-parent in the position of A.H. standing to intervene and interfere with a step-parent adoption that complies with all existing statutory criteria.

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[4] The Appellant also cites the unreported decision of *Hammond v. Foellger, 2007 Ky. Unpub. LEXIS 29 (Ky. Mar. 22, 2007)* in a footnote in support of the argument that the Appellant has the right to intervene in this case under the theory that the Family Court has the "authority and responsibility to hear all matters related to the custody and care of the child" in determining the placement of a child. Initially, it should be noted that the *Hammond* case is an unpublished opinion and cannot be cited as authority before this Court. Further, the Appellant failed to attach a copy of that decision to her Brief for the Appellees to review. However, based on the statements in the Appellant's Brief regarding the *Hammond* case, it is clear that it also dealt with the issue of the placement of a child with a non-relative versus a relative when there was no biological parent involved. The Appellant cites an additional unreported decision, *J.L. v. Cabinet, 2010 Ky. App. Unpub. LEXIS 639 (Ky. Ct. App. Aug. 13, 2010)*, in support of her argument that she should be permitted to intervene in this case notwithstanding the absence of standing. However, that case again dealt with a grandparent's request to intervene in an adoption proceeding, and that request was denied. Further, the Appellant likewise failed to attach a copy of that case to her Brief, and it cannot be cited as authority before this Court.

C. There Was No Legally Enforceable Agreement Between M.L. And A.H. Regarding Custody Of M.L.'s Child, And Therefore, The Court's Rationale In *Mullins v. Pickelsimer* Is Not Applicable

The Family Court determined that the Appellant, A.H., was permitted to intervene in the underlying adoption proceeding due to a "present and substantial interest in the custody of the child." (R p.60). This is simply not the standard for intervention in an adoption proceeding as discussed above. Further, as recognized by the Court of Appeals, the Kenton Circuit/Family Court erroneously noted that A.H. had a "colorable claim to seek custodial rights" to the child under the Kentucky Supreme Court's ruling in *Mullins v. Pickelsimer, 317 S.W.3d 569 (Ky. 2010).* (R p.59).

While the facts in this case may have some similarity to the facts in *Mullins,* this case is clearly distinguishable from the *Mullins* case, and the Appellant does not meet the standard for a person seeking custodial rights under the present state of Kentucky law. ***While the legislature may ultimately decide to change the law due to the our evolving culture and the recent decision of the United States Supreme Court regarding same sex marriages, this Court must adhere to the law in Kentucky as it exists at this time.***

The *Mullins* case does grant a same-sex partner the ability and authority to seek custody of a non-biological child. That case, however, is distinguishable from the matter at bar in a very significant way. While many of the factors present in *Mullins* are also present here (as illustrated by the comparative table in Appellant's Brief), the most important factor is ***not*** present, that being the parties entering into a legally enforceable agreement regarding custody of the child (R p.45). Mullins and Pickelsimer had filed a Petition, Entry of Appearance and Agreed Judgment elevating both parties to the status of a parent. This is clear evidence of the intent on Pickelsimer's part to give up her superior

right to custody in favor of joint custody with Mullins--a fact that is glaringly absent and vehemently denied by M.L. in the instant case. Six months after they filed the Agreed Judgment, Pickelsimer unilaterally ceased visitation in violation of the Judgment which she had signed. That is ***not*** the case here.

The Appellant criticizes the distinctions drawn by the Court of Appeals regarding the amount of time that Mullins had physically cared for and supervised the child in that case. She argues that the Court of Appeals "acknowledged but shrugged off the discrepancy regarding the dates" that Mullins was in the home caring for the child. Perhaps the Court did not seek a definitive answer to that question because that fact was not crucial to its decision. Rather, the Court stated that "the child lived with the petitioner up to and until the petition for custody was filed and that fact, ***coupled with an agreed order entered by the court wherein the birth mother partially waived her superior right to custody, gave her standing as a person acting as a parent."*** (Emphasis added.)

A review of the *Mullins* case clearly reveals that (as the Court of Appeals noted) the parties "secured an agreed order identifying Mullins as a *de facto* custodian." De facto custodianship is one vehicle that grants a party standing. It was present in the *Mullins* case and is clearly absent in the instant case. *That* is the most significant distinguishing factor between the facts of the instant case and those present in the *Mullins* case.

In the instant case, the desire for joint custody that A.H. alleges (and that M.L. again vehemently denies) is not present (R p.45). The parties did not put any such desires into writing, nor did they petition the Family Court for any joint custody or shared

parenting, or take any other legal steps to elevate A.H. to the level of a parent as the parties did in *Mullins*. (VR No. 1: 6/18/14; 11:14:24). Indeed, M.L. did not take any legal steps whatsoever which would constitute a waiver of her superior right to custody of her child. The Court of Appeals found this persuasive.

The Appellant emphasizes the existence of a "writing" that was signed by A.H. and the sperm donor prior to the conception of the child (R p.17), and argues that M.L. waived her superior right to custody of her child by drafting that document. The Court of Appeals acknowledged that the document signed by A.H. and the sperm donor has no legal relevance, as it was drafted by M.L. who is not an attorney and, as such, cannot create a legal document presumptively intended to affect the rights of two other persons. Apparently, the Appellant thinks this Court should find this document persuasive, as she spends nearly three pages of her Brief arguing its relevance. Interestingly, in her Brief, the Appellant completely fails to acknowledge that the document is not signed by M.L. and, therefore, cannot be construed against her.

It is imperative that this Court remember that M.L.'s child ***had not yet been born or even conceived*** at the time the document in question was drafted. Kentucky law mandates that the document signed by A.H. and the sperm donor is unenforceable as a matter of law, not just because it was drafted by a non-lawyer and not signed by the biological mother, but because it was an agreement regarding a contingent rather than a vested interest in an unborn child. As this Court is aware, a consent to the adoption of ***an unborn child*** is unenforceable. *See* K.R.S. 199.500. This is similar to the situation of a surrogate mother who signs a contract and later changes her mind, and it is well-established in this state that such a contract is unenforceable even though it was signed by

the surrogate mother. *Ky. OAG 81-18.* Further, A.H. and the sperm donor who signed that document do not have the judicial or legal right or authority to grant or confer parentage upon anyone or to limit or restrict M.L.'s superior and exclusive right to custody of her child. As this Court stated in *Young v. Commonwealth, 2011-CA-000956-MR, 2011-CA-000957-MR,* "[t]he Courts cannot 'clothe with legality a contract that is absolutely illegal and void[,]'" (citing *Tobacco By-Products & Chemical Corp v. Western Dark Fired Tobacco Growers Ass'n, 280 Ky. 469, 133 S.W.2d 723, 726 (Ky. 1939).*) As the Appellant herself states in her Brief, "people cannot draw up contracts that make binding allocations of parental or custodial responsibilities for a child." Therefore, the Court of Appeals correctly concluded that the document signed by A.H. and the sperm donor prior to the conception of M.L.'s child is unenforceable and has no relevance in this case.

Further, it is significant to note that the *Mullins* case did not involve an underlying adoption proceeding and the interpretation of the relevant adoption statutes as does this case. Contrary to the Appellant's assertions in her Brief, the Court of Appeals' ruling in this case is not in contradiction and in conflict with the Supreme Court's ruling in the *Mullins* case. This case involves a step-parent adoption proceeding.

The Appellant is clearly mistaken in her supposition that *Mullins* is significantly similar to this case. The Appellees have at all stages acknowledged that there are certain similar facts between the *Mullins* case and the instant case. However, for the Appellant to assert that the one and only real distinction is that A.H. spent more time bonding with M.L.'s child than Mullins did with the child in that case clearly demonstrates that Appellant has missed the point.

Merely spending time with a child does not confer parental rights. If the act of spending time with a child did confer parental rights, as the Appellant seems to intimate, then a babysitter, nanny, au pair, daycare provider or even a child's teacher could claim he or she has parental rights. This is clearly not the state of the law in Kentucky and would lead to an absurd result. The Court of Appeals recognized that in this case, as do the Appellees. The Appellant, however, simply does not get it.

D. The Court of Appeals Correctly Concluded That A.H. Does Not Qualify As A De Facto Custodian Under K.R.S. 403.270(1) To Afford Her Any Standing In This Case.

K.R.S. 403.270 (1)(a) defines "de facto custodian" as:

> "A person who has been shown by **clear and convincing evidence** to have been ***THE primary caregiver for***, ***AND*** **financial supporter of**, a child who has resided with the person for a period of six (6) months or more if the child is under three (3) years of age and **for a period of one (1) year or more if the child is three (3) years of age or older** or has been placed by the Department for Community Based Services." (Emphasis added.)

In the instant case, the Appellant has neither made this claim, nor tried to prove it by clear and convincing evidence. In fact, the arguments made on her behalf at the hearing and oral argument before the Kenton Circuit/Family Court on June 18, 2014, indicate that she believed she was exercising "parenting time" or "scheduled visitation" with the child (VR No. 1: 6/18/14; 11:24:50, R p.13), not that she was ***"the primary caregiver"*** or ***"financial supporter"*** of M.L.'s child. See *Consalvi v. Cawood, 63 S.W.3d 195 (Ky. App. 2001), abrogated on other grounds by Moore v. Asente, 110 S.W.3d 336 (Ky. 2003).* It is clear based upon the record before this Court that the Appellant does not rise to the level of a "de facto" custodian as defined by K.R.S. 403.270(1).

Absent any of the above written or established situations, the Appellant's position can and should be viewed as the *"ex-significant other"* of a woman who gave birth to a child during the course of a relationship. Taking the same-sex aspect out of the situation, we can analyze it the same as if a woman gave birth during the course of a heterosexual relationship without marriage. Even if the parties raised the child for a period of time together, there is no precedent upon which to base a custody assertion. Often, the male significant other in that situation even believes that the child is his for a time, raising it as such. (Not true in this case, where the Appellant clearly knew and has known that the child is not biologically hers.) (R p.17). When true parentage comes to light, he realizes that he does not have any rights to that child, and is dependent upon the mother for any visitation whatsoever. While that may be an unfortunate situation in some cases, it is the law that is in place and has been followed consistently in this jurisdiction. An *"ex-significant other"* who happens to be the same-sex as the mother in this case should not be entitled to more preferable treatment that an ex who is the opposite sex. As such, the Court of Appeals correctly determined that the Appellant did not have standing as a "de facto custodian" upon which to intervene into this step-parent adoption case.

E. A.H. Does Not Meet The Definition Of A Parent As Set Forth In K.R.S. 403.800(13) To Have Standing Under The Uniform Child Custody Jurisdiction Enforcement Act.

The Appellant argues in her Brief before this Court that the UCCJEA has supplemented the de facto custodian statute with another basis for seeking custody other than being "the primary caregiver" and "financial supporter" of a child by extending that right to a "person acting as a parent." In furtherance of this argument, the Appellant claims that she falls within the category of a "person acting as a parent."

Initially, it is significant to note that this argument by the Appellants is precluded in this case by the express language of the UCCJEA. As recognized by the Court of Appeals in its Opinion, the UCCJEA explicitly states that K.R.S. 403.800 to 403.880 shall not govern "an adoption proceeding." Although this Court could look to the provisions of the UCCJEA as grounds to establish standing in a custody proceeding, the express language of the UCCJEA explicitly and directly prohibits its application in an adoption proceeding. Therefore, that statute clearly does not apply in this case.

Further, the Appellant does not satisfy the criteria necessary to qualify as a "person acting as a parent" under the UCCJEA. The phrase "person acting as a parent" is defined in K.R.S. 403.800(13) as follows:

> "a person, ***other than a parent***, who: (a) **Has physical custody** of the child or has had physical custody for a period of **six (6) consecutive months**, including any temporary absence, within one (1) year immediately before commencement of a child custody proceeding; ***and*** (2) **Has been awarded legal custody** by a court or claims a right to legal custody under the laws of this state." (Emphasis added.)

The term "physical custody" is thereafter defined in K.R.S. 403.800(14) as "physical care and supervision of a child." Clearly, as recognized by the Court of Appeals, the Appellant cannot satisfy either of these two prongs to be characterized as a "person acting as a parent" under the UCCJEA. Even assuming the Appellant did meet the requirement for having physical custody and had a valid and colorable claim to legal custody of M.L's child, she does not meet the requirements of K.R.S. 403.800(13) of having M.L.'s child in her physical custody for a period of six (6) consecutive months.

The parties in this case did not seek legal custody by any court when they were dating, let alone having been awarded it (VR No. 1: 6/18/14; 11:14:24), and neither party has made any claim or produced any evidence to the contrary. A.H. simply does not meet the requirements of K.R.S. 403.800(13)(b) to qualify as a "parent" of M.L.'s child. They did not petition any Court for joint custody, nor did they take any preliminary steps towards that ideal. Indeed, they did not even seek legal counsel to begin that process while they were together. As such, A.H. cannot be defined as a "person acting as parent" and does not have standing to seek custody in this case which, again, was correctly recognized by the Court of Appeals based upon the record before it and before this Court.

F. The Court of Appeals Correctly Held That Standing Is Required In Order For A.H. To Intervene In This Adoption Proceeding.

As outlined above and in the Court of Appeals' well-reasoned Opinion in this case, it is clear that there is no scenario under which the Appellant has standing to intervene in this adoption proceeding. The Appellant seeks to circumvent the requirement of standing by arguing that she does not need have standing in the adoption case in order to intervene in this proceeding by claiming that she has an interest in M.L.'s child which permits her to seek custody. The Appellant claims that she is not seeking to adopt M.L.'s child, rather she is seeking custody, and since she is seeking custody rights over the same child sought to be adopted in this proceeding, the Appellant leaps to the conclusion that she should have a right to intervene in this step-parent adoption proceeding. The Appellant's argument in this regard is flawed for the reasons discussed above.

The Appellant relies on the Kentucky Court Appeals decision in *Carter v. Smith, 170 S.W.3d 402 (Ky. App. 2004)* in support of her argument that standing in this adoption proceeding is not required. The Court in *Carter* cited by the Appellant does recognize that the party seeking intervention in that case should be permitted to intervene even though he was not seeking the same relief that the plaintiff was seeking. However, that case did not involve the type of action which is available only as a matter of statute like an adoption. As noted above, adoption is purely statutory, and the Appellant simply cannot establish that she has the requisite standing to intervene in this adoption.

III. THE APPELLLANT SHOULD NOT BE PERMITTED TO PIGGYBACK HER CUSTODY ARGUMENT INTO AN ADOPTION APPEAL.

The Appellees submit to this Court that the Appellant is improperly trying to piggyback her custody argument into this adoption appeal. As repeatedly addressed in this Brief, the Appellant has made recurring and repetitive arguments in her Brief regarding the Petition for Joint Custody she filed with the Kenton Circuit/Family Court and regarding her desire for joint custody of M.L.'s child. Again, as noted at the onset in this Brief, the Appellant filed that Petition under a separate case number in the Kenton Circuit/Family Court. No hearing has ever been held in that case, and no documents or evidence under that case number are or have been made a part of the record of this case.

As stated at the beginning of this Brief, this appeal arises solely from a Petition for Adoption that was filed in the Kenton Circuit/Family Court. It is that step-parent adoption proceeding into which Appellant moved to intervene; in that adoption action her intervention was granted; that adoption action which was dismissed; that intervention and dismissal in the adoption action which were appealed to the Court of Appeals; and that

intervention and dismissal of the adoption action which the Court of Appeals reversed. The Appellant desires to make this into a much larger issue addressing her right to seek joint custody of M.L.'s minor child. Indeed, the Court of Appeals noted in a footnote that the Appellant does not have standing "based on the record in this appeal" to assert a custody claim to M.L.'s child.

The Appellant attacks the Court of Appeals' decision that A.H. does not have standing to pursue joint custody under the facts in the record in this case. The Appellant again fails to understand the fact that the Court of Appeals addressed her standing to seek intervention and dismissal of the Petition for Adoption. The Court of Appeals' decision about the Appellant's lack of standing to seek joint custody was explained in a footnote. Specifically, the Court of Appeals states in its footnote 7 "to be clear, our conclusion that A.H. does not have standing to bring a custody claim under *Mullins v. Pickelsimer* is based on the record in *this* appeal...Whether she can allege and prove those facts in a different proceeding--a custody proceeding--is not now before this Court." This is the only conclusion that the Court of Appeals could have reached under the facts in the record before the Court.

But once more, the issue of custody was **not** before the Court of Appeals and is not before this Court. While it is true that the Court of Appeals made the statement that it did not believe that the Appellant would have standing to bring a custody claim, the Court of Appeals made it perfectly clear that the issue of custody was not before it. The matter related to the Appellant's custody proceeding is a case which has not been adjudicated, decided or appealed. It is simply not an issue before this Court, and the Court of Appeals correctly reached that conclusion.

IV. THIS COURT IS NOT BARRED FROM CONSIDERING THE ADDITIONAL THEORIES WHICH MIGHT HAVE GIVEN THE APPELLANT STANDING IN THIS CASE WHICH WERE ANALYZED BY THE COURT OF APPEALS IN ITS OPINION.

It is true that the Court of Appeals addressed several theories under which the Appellant might potentially have standing in this case (in addition to those espoused by either party) in its analysis of whether the Appellant has standing in this case to intervene. The Appellees clearly preserved the issue of standing before the Kenton Circuit/Family Court and the Court of Appeals. The fact that in its analysis the Court of Appeals attempted to give the Appellant the benefit of the doubt and looked for theories under which she might have standing in this case that were not espoused by the Appellees in the Court of Appeals, or in the Family Court, and which were not advocated by the Appellant in any of her arguments, is not fatal to the Appellees' position before this Court.

The Appellant is correct in her assertion in her Brief that a trial court's decision should only be reversed for preserved errors. See *Fischer v. Fischer, 348 S.W.3d 582 (Ky. 2011)*, and *Harrison v. Leach, 323 S.W.3d 702 (Ky. 2010)*. However, the Appellees clearly preserved the issue of the Appellant's lack of standing in this case both before the Kenton Circuit/Family Court and before the Court of Appeals. Therefore, this argument by the Appellant in her Brief is without merit.

The Court of Appeals addressed those additional theories under which the Appellant might potentially have standing to give her every benefit of the doubt on the issue of standing. Yet now, the Appellant wants to criticize the Court of Appeals for its exhaustive analysis. In contrast, had the Court of Appeals in its exhaustive analysis determined that there was some theory under which the Appellant would have standing in

this case to thwart the adoption proceeding and keep it from moving forward, the Appellant would not be complaining even if that theory had not been discussed previously or preserved by either party. Rather, she would be applauding the Court of Appeals. For the Appellant to now criticize the Court of Appeals for giving her the benefit of the doubt and trying to determine if there was some theory under which she might potentially have standing in this case is disingenuous.

Further, the Appellant's Brief is fraught with multiple arguments which were never raised by the Appellant in the Family Court or the Court of Appeals. To coin the old adage, the Appellant wants to "have her cake and eat it too." The Appellant cannot urge this Court to disregard the sound and exhaustive legal reasoning of the Court of Appeals in determining whether she had standing to intervene in the adoption proceeding in this case because the Court of Appeals addressed theories of standing which were not raised by either party in the underlying proceeding or before the Court of Appeals, yet now interject arguments in her Brief before this Court which were never raised on her behalf in the Family Court or the Court of Appeals. This argument by the Appellant is yet another veiled attempt to sway this Court's analysis and should be discounted by this Court as such.

CONCLUSION

The Appellees urge this Court to affirm the decision of the Court of Appeals, finding that the Appellant, A.H., did not have standing to intervene and that her consent is not required in this step-parent adoption proceeding and to remand this case to the Kenton Circuit Family Court with directions permitting the adoption to proceed. It is true as

stated by the Family Court and asserted by the Appellant in her Brief that "adoption of a child forever change the rights and obligations of those persons having a custodial interest in the child." The fallacy in the Appellant's argument is, however, that she does not possess a "custodial" interest in M.L.'s child under any established Kentucky law so as to give her standing to object to the adoption for the reasons set forth above as M.L. has not relinquished her exclusive custodial rights to her child. Indeed, a biological parent's superior right to custody over a non-parent is tantamount and cannot be defeated in the absence of clear and convincing evidence of a waiver of that right. This Court cannot give the Appellant rights which have not been afforded to her by either the legislature of this State, or in the case law interpretations of the existing statutes.

The Appellant's Brief contains a litany of "smoke and mirrors" in an effort to mask the fact that M.L. has not waived her superior right to custody of her child and that A.H. does not have any standing with regard to the proposed adoption of M.L.'s child. In essence, A.H. is attempting herself to gain a superior right to custody over a biological parent and has no standing to do so. In her Brief, A.H. cites to a number of decisions from other jurisdictions to support her arguments, but whatever the law may be in those other jurisdictions is not binding or controlling in this case. This Court must base its decision on the current statutory scheme for adoption and the case law interpretations thereof currently in effect in the Commonwealth of Kentucky, not some other State.

The Appellees recognize that this is an emotional issue and that the law may be emerging and may eventually be changed as it relates to children conceived, born and reared during a same-sex relationship. However, at this juncture, this Court must apply the statutory laws as they are currently written and in effect, and as interpreted by prior

judicial precedent, to the facts in the record in this case which are before the Court. In doing so, it is respectfully submitted that this Court can reach no other conclusion than to affirm the Court of Appeals' decision.

Respectfully Submitted,

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